NECESSARILY AND LESSER-INCLUDED OFFENSE, IN GENERAL
(REVISED 2/2016)

Table of Contents

I. Rule 13.2(c), Charging Documents

In Arizona, an indictment for a crime is treated as an indictment of all lesser-included offenses. Rule 13.2.(c), Ariz. R. Crim. P. provides:

> Notice of Necessarily Included Offenses. Specification of an offense in an indictment, information, or complaint shall constitute a charge of that offense and of all offenses necessarily included therein.

This provision is intended as a solution to the ambiguities caused by "open" charges – *i.e*., charges which do not specify the degree of a crime charged – by requiring the prosecutor to specify only the most serious degree, and automatically including all necessarily included offenses within the charge. This also clarifies the prosecutor's right to request instructions as to necessarily included offenses under Rule 23.3. Comment, Rule 13.2(c).

The specification of an offense in an indictment thus constitutes a charge of that offense and all offenses necessarily included therein. *State v. Hines*, 232 Ariz. 607, 610, ¶ 9 (App. 2013). As a result, a "defendant is on notice from the beginning of the proceedings against him that the jury may be asked to consider any lesser-included offenses supported by the trial evidence." *State v. Erivez*, 236 Ariz. 472, 476, ¶ 21 (App. 2015), *quoting State v. Gipson,* 229 Ariz. 484, 486–87, ¶ 14 (2012); *see also State v. Blakley*, 204 Ariz. 429, 440, ¶ 51 (2003)(an indictment on a greater offense puts a defendant on notice of all lesser-included offenses as soon as he is indicted) .

Rule 13.2 is permissive, not restrictive; thus, the State may charge both the lesser-included and greater offense. *Merlina v. Jejna*, 208 Ariz. 1, 3, ¶¶ 9-10 (App. 2004).

- But see Charging Both Lesser-Included and Greater Offenses: Multiplicity, *infra*.

II. Rule 23.3, Instructions and Verdicts

Rule 23.3, Ariz. R. Crim. P. ("Conviction of necessarily included offenses"), provides:

> Forms of verdicts shall be submitted to the jury for all offenses necessarily included in the offense charged, an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense. The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury.

This rule is designed to prevent a jury from convicting a defendant of a crime, even if all of its elements have not been proved, simply because the jury believes the defendant committed some crime. *State v. Wall*, 212 Ariz. 1, 4, ¶ 16 (2006). The rule permits the jury to find the defendant guilty of any offense necessarily included in the offense charged, including an attempt to commit the offense if such an attempt is a crime. A necessarily included offense is one where some of the elements of the crime charged themselves constitute a lesser crime. The rule places the responsibility for deciding what verdicts the jury may return on the court, restricting the jury to only returning verdicts for which forms have been submitted to it. Comment, Rule 23.3.

1. When Instruction Required

A trial court must instruct the jury on all offenses necessarily included in the offense charged if asked to do so. *State v. Speers*, 238 Ariz. 423, ¶ 19 (App. 2015). A lesser-included offense instruction must be given, if requested, if the jury could find that (1) the state failed to prove an element of the greater offense, and (2) the evidence is sufficient to support a conviction on the lesser offense. *State v. Hargrave*, 225 Ariz. 1,

11, ¶ 33 (2010), *citing State v. Wall,* 212 Ariz. 1, 4 ¶ 18 (2006). Both the defendant and the prosecutor are entitled to instructions on any lesser-included offense for which there is evidentiary support. *State v. Hurley*, 197 Ariz. 400, 403, ¶ 13 (App. 2000).

Under Rules 13.2 and 23.3, Ariz. R.Crim. P., the State is "entitled to lesser included instructions when the evidence so warrants" – even if the defendant objects and wishes to stand on an all or nothing offense. *State v. Gipson,* 229 Ariz. 484, ¶¶ 7-11 (2012). But even when the trial court provides a lesser-included offense instruction *sua sponte*, over the objections of *both* the State and the defendant, "if the instruction is given and supported by the evidence, a resultant conviction for the lesser-included offense does not violate the defendant's constitutional rights or contravene any Arizona statute or rule," and will not be disturbed on appeal. *Id.* ¶¶ 13- 17.

- See also: All or Nothing Defense, *infra*; Homicide, *infra*.

2. Waiver

Parties must submit to the trial court their written requests for instructions and forms of verdict. Rule 21.2, Ariz. R. Crim. P. "No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof or to the submission or the failure to submit a form of verdict unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of his or her objection." Rule 21.3, Ariz. R.Crim. P. Thus, a party who fails to object to an error or omission in a jury instruction waives the issue on appeal, absent a finding of fundamental error. *State v. Valenzuela,* 194 Ariz. 404, ¶ 2 (1999); see also *State v. Hargrave,* 225 Ariz. 1, ¶ 32 (2010)(reviewing failure to object to verdict forms for fundamental error).

` **3. Necessarily vs. Lesser-Included Offenses**

A trial judge is required to instruct only on "necessarily included offenses," Ariz. R.Crim. P. 23.3; *see also State v. Valenzuela,* 194 Ariz. 404, ¶ 10 (1999). Although the terms are often used interchangeably, a "lesser included" offense is not always a "necessarily included" offense for purposes of Rule 23.3. An offense is lesser-included when the greater offense cannot be committed without necessarily committing the lesser offense. But an offense is "necessarily included," and so requires that a jury instruction be given, only when it is lesser-included *and* the evidence is sufficient to support giving the instruction. In other words, if the facts of the case as presented at trial are such that a jury could reasonably find that only the elements of a lesser offense have been proved, the defendant is entitled to have the judge instruct the jury on the lesser-included offense. *State v. Wall*, 212 Ariz. 1, 3, ¶ 14 (2006), citing *State v. Dugan*, 125 Ariz. 194, 195 (1980).

For evidence to be sufficient in this context, the evidence must allow a jury to reasonably find (a) the state failed to prove an element of the greater offense and (b) the defendant committed only the lesser. *Wall*, 212 Ariz. 1, ¶ 18. It is not enough that, as a theoretical matter, the jury might simply disbelieve the state's evidence on one element of the crime, because this would require instructions on all offenses theoretically included in every charged offense. Instead, the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense. *Id*., citing *State v. Caldera*, 141 Ariz. 634, 636–37 (1984). In other words, the court "must examine whether the jury could rationally fail to find the distinguishing element of the

greater offense." *State v. Delahanty*, 226 Ariz. 502, ¶ 23, (2011), quoting *State v. Bearup*, 221 Ariz. 163, ¶ 23 (2009).

4. Test for Lesser-Included Offenses

Necessarily included offenses are those lesser-included offenses that are supported by the evidence. *State v. Hines*, 232 Ariz. 607, 610, ¶ 9 (App. 2013). There are two tests to determine whether an offense is a lesser-included offense: the "elements" test, and the "charging documents" test. *State v. Hines*, 232 Ariz. 607, 610, ¶ 10 (App. 2013), citing *State v. Larson*, 222 Ariz. 341, 343, ¶ 7 (App. 2009). Under the elements test, a lesser-included offense is an offense that is composed solely of some but not all of the elements of the greater offense, so that it is impossible to have committed the greater offense without having committed the lesser offense. *State v. Hines*, 232 Ariz. 607, 610, ¶ 10 (App. 2013), citing *State v. Celaya*, 135 Ariz. 248, 251 (1983). Under the charging documents test, a lesser-included offense is an offense that would not always form part of the greater offense but is nonetheless described by the charging document. *State v. Hines*, 232 Ariz. 607, 610, ¶ 10 (App. 2013), citing *Larson*, 222 Ariz. at 344, ¶ 13. However, this does not include all the facts contained in the record, *i.e*., the "evidentiary test." *State v. Robles*, 213 Ariz. 268, 271, ¶¶ 7-9 (App. 2006), citing *State v. Teran*, 130 Ariz. 277, 279 (App. 1981)(rejecting "evidentiary test"), and declining to extend *State v. Magana,* 178 Ariz. 416, 418 (App. 1994)(finding reckless driving a lesser-included offense of second-degree murder based on charging document locating the crime on a highway and the facts known by the parties).

- But see Double Jeopardy vs. Jury Instructions, *infra*.

5. More Than One Lesser-Included Offense

A defendant may be convicted of two independent lesser-included offenses arising from one count. *State v. Erivez*, 236 Ariz. 472, 476, ¶ 19 (App. 2015)(since disorderly conduct and assault are independent lesser-included offenses of aggravated assault, and assault is not a lesser-included offense of disorderly conduct, the jury is not required to consider the charge of disorderly conduct before considering assault).

6. Same or Lesser Penalty

A lesser-included offense can have the same or lesser penalty as the greater offense. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 12 (App. 1998). However, a lesser-included offense cannot have a greater penalty than the greater offense. Further, because greater and lesser-included offenses are considered the "same offense," the Double Jeopardy Clause forbids the imposition of a separate punishment for a lesser offense when a defendant has been convicted and sentenced for the greater offense. *State v. Garcia*, 235 Ariz. 627, 629, ¶ 5 (App. 2014), citing *Illinois v. Vitale*, 447 U.S. 410, 421 (1980); *State v. Chabolla–Hinojosa*, 192 Ariz. 360, 362–63 ¶¶ 10–13, (App.1998). *See also State v. Price*, 218 Ariz. 311, 313, ¶ 4, 183 P.3d 1279, 1281 (App. 2008)(double jeopardy principles prohibit convictions for both a greater offense and a lesser included offense; violation of double jeopardy is fundamental error).

- See Verdicts, *infra*; Double Jeopardy vs. Jury Instructions, *infra*.

7. Lesser-Included Instructions, "All or Nothing" Defense

A. Defense Request

An all-or-nothing defense does not cause a defendant to forfeit his or her right to a lesser-included offense instruction. As a practical matter, when a defendant asserts

an all-or-nothing defense such as alibi or mistaken identity, there will usually be little evidence to support an instruction on the lesser included offense. But the evidence in the record can be sufficient to require a lesser-included offense instruction even when the defendant employs an all-or-nothing defense; for example, in a robbery case the jury might reasonably believe portions of the clerk's story and portions of the defendant's story and find a key element, force, had not been established but yet a lesser-included crime, theft, nonetheless had been committed. *State v. Wall*, 212 Ariz. 1, 6, ¶¶ 29-30 (2006), *citing State v. Dugan,* 125 Ariz. 194, 195-96 (1980).

- Note, in *State v. Speers*, 238 Ariz. 423, ¶¶ 19-24 (App. 2015), the Court held that under *Wall*, decided the year before the defendant's trial, the defendant raised a colorable claim of ineffective assistance of counsel based on counsel's affidavit explaining she abandoned a lesser-included instruction because although she was aware contributing to the delinquency of a minor is a lesser-included offense of child molestation, she concluded it did not apply where the defense was that the defendant never inappropriately touched the victim. The Court noted although defendant denied molesting the victims, he did not contest the state's evidence that he had admitted engaging in what he characterized as “inappropriate” conduct with them, including kissing, hugging, and “patting some of the students on the bottom.” A rational juror could thus conclude he committed only the lesser offense.

Compare: *State v. Larin*, 233 Ariz. 202, 207, ¶ 12 (App. 2013)(mere presence defense in robbery case demonstrated there was little evidence on which to support a lesser-included offense instruction); *State v. Delahanty*, 226 Ariz. 502, 507, ¶¶ 22-27 (2011)(where defendant shot police officer three times at close range in the face there was no evidence supporting instructions for lesser-included offenses of second degree-murder, manslaughter, and negligent homicide); *State v. Sprang*, 227 Ariz. 10, 12, ¶¶ 6-8 (App. 2011)(evidence did not support instruction on second-degree murder where it showed only premeditation.

B. State Request; *Sua Sponte* Instruction

A defendant does not have an absolute right to an all-or-nothing defense. *State v. Gipson,* 229 Ariz. 484, ¶¶ 7-9 (2012). Under Rules 13.2 and 23.3, Ariz. R.Crim. P., the state is "entitled to lesser included instructions when the evidence so warrants." *Gipson,* ¶ 11. But even when a trial court provides a lesser-included offense instruction *sua sponte*, over the objections of both the State and the defendant, "if the instruction is given and supported by the evidence, a resultant conviction for the lesser included offense does not violate the defendant's constitutional rights or contravene any Arizona statute or rule," and it will not be disturbed on appeal. *Id.* ¶ 17.

- See also Homicide, *infra*

8. Homicide

The requirement that trial judges must instruct on every lesser-included offense supported by the evidence in *all* homicide cases, whether or not such an instruction was requested, was abandoned through implementation of Rule 21.3(c). But just because judges are no longer invariably required in non-capital cases to instruct on lesser-included offenses supported by the evidence, they are not prohibited from doing so when both parties object to the instruction. Although Rule 23.3 does not mandate that a lesser-included offense instruction be submitted over the objections of the defendant and the State, it does not preclude the trial judge, in his or her discretion, from doing so. Moreover, Rule 13.2(c) provides that "[s]pecification of an offense in an indictment, information, or complaint shall constitute a charge of that offense and of all offenses necessarily included therein." Thus, the defendant is on notice from the beginning of the proceedings against him that the jury may be asked to consider any lesser-included

offenses supported by the trial evidence. *State v. Gipson*, 229 Ariz. 484, 485-87, ¶¶ 13-14 (2012).

This is not to say that trial courts should ignore the objections of both the defendant and the State to a lesser-included offense instruction; in general, such an issue best resolved, in our adversary system, by permitting counsel to decide on tactics. *State v. Gipson*, 229 Ariz. 484, 487, ¶ 15 (2012). When both parties object to a lesser included-offense instruction, the trial court should be loath to give it absent compelling circumstances to the contrary. But if the instruction is given and supported by the evidence, a resultant conviction for the lesser-included offense does not violate the defendant's constitutional rights or contravene any Arizona statute or rule. *Id.*, ¶ 17.

In capital cases, the trial court must instruct the jury on all lesser-included offenses reasonably supported by the evidence. *State v. Wood,* 180 Ariz. 53, 65 (1994); *State v. Comer*, 165 Ariz. 413, 422 (1990), *citing Beck v. Alabama*, 447 U.S. 625 (1980); *State v. Amaya-Ruiz*, 166 Ariz. 152, 174 (1990). But, a defendant may waive any right to a jury instruction on a lesser-included offense in a capital case by objecting to the instruction; the trial judge is not bound by to give the instruction under such circumstances. *State v. Gipson*, 229 Ariz. 484, 485, ¶¶ 8-9 (2012). *See also State v. Anderson*, 210 Ariz. 327, 344, ¶¶ 64-65, supplemented, 211 Ariz. 59, ¶¶ 64-65 (2005)(denial of aggravated assault instruction in capital homicide did not violate due process; jury was instructed on second-degree murder and manslaughter, and since jury had option of immediately-lesser included offenses but nonetheless found defendant guilty of first-degree murder, it necessarily rejected all other lesser-included offenses).

In a capital case, when the evidence supports a lesser-included offense instruction and the prosecution wants the jury instructed on any lesser-included offenses, the trial court must instruct the jury on the lesser offenses – even over the defendant's objection. *State v. Cruz*, 189 Ariz. 29, 33 (App. 1996), superseded by statute on other grounds, *see State v. Sierra-Cervantes*, 201 Ariz. 459, 461, ¶ 10 (App. 2001). A defendant should receive instructions on any theory of a case, including differing degrees of homicide, which the evidence supports. A party who fails to object to an error or omission in a jury instruction waives the issue on appeal, absent a finding of fundamental error. *State v. Valenzuela*, 194 Ariz. 404, 405, ¶ 2 (1999)(failure to instruct on manslaughter in addition to second-degree murder as lesser-included offenses to first-degree murder erroneous in light of evidence from which jury could have found victim was shot when she stepped between defendant and companion, whom defendant intended only to frighten, as defendant discharged his gun).

9. Le Blanc "Reasonable Efforts" Instruction

A jury may deliberate on a lesser offense if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge. *State v. Erivez*, 236 Ariz. 472, 475, ¶ 14 (App. 2015), citing *State v. LeBlanc,* 186 Ariz. 437, 438 (1996). "Reasonable efforts" is not the equivalent of "genuine deadlock." *State v. Espinoza*, 233 Ariz. 176, 180, ¶ 10 (App. 2013). The "reasonable efforts" procedure reduces the risks of false unanimity and coerced verdicts, diminishes the likelihood of a hung jury, and because the jury must give diligent consideration to the most serious crime first, the State's interest in a full and fair adjudication of the charged offense is adequately protected. *LeBlanc*, 186 Ariz.

at 438-39. The *LeBlanc* court held that beginning no later than January 1, 1997, trial courts shall give a "reasonable efforts" instruction in every criminal case involving lesser-included offenses. *Id*. at 440.

However, since provocation manslaughter is not a lesser-included offense of second-degree murder, *LeBlanc* does not apply if a provocation-manslaughter instruction is given in a murder trial. In a second-degree murder prosecution, when there is evidence that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, the court should instead instruct the jury:

> If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant guilty of manslaughter rather than second-degree murder.

State v. Lua, 237 Ariz. 301, 306-07, ¶¶ 19-20 (2015), citing RAJI (Standard Criminal) 11.04 (3d ed.).

- See Less Serious Offenses vs. Lesser-Included Offenses, *infra*.

III. Verdict Forms

The jury must be provided with verdict forms allowing the jury to find the defendant guilty or not guilty of the greatest charged offense and all lesser-included offenses. *State v. Knorr,* 186 Ariz. 300, 304 (App. 1996). But the court need not provide the jury with specific "not guilty" forms for all lesser-included offenses; it is sufficient if there is a generic "not guilty" form so long as it gives the jury an opportunity to acquit the defendant on every offense. *State v. Hernandez*, 191 Ariz.

553, 561, ¶ 38 (App. 1998); see also *State v. Canion*, 199 Ariz. 227, 231-32, ¶ 16 (App. 2000).

A conviction for both a greater and a lesser-included offense violates the prohibition against double jeopardy. *State v. Becerra*, 231 Ariz. 200, 205, ¶ 20 (App. 2013). When a jury returns guilty verdicts for both a charged offense and a lesser-included offense, the preferable course of action is to 'explain the situation to the jury, reinstruct on the law, and allow the jury to deliberate further. *State v. Rich*, 184 Ariz. 179, 181 (1995). The court may also call a mistrial. *State v. Hansen*, 237 Ariz. 61, 66, ¶ 14 (App. 2015). Remedial efforts are appropriate, however, when a jury returns (1) guilty verdicts on both a greater and lesser-included offense, or (2) an ambiguous verdict finding the defendant guilty and not- guilty of the same offense, or guilty of the greater offense but not guilty of the lesser included offense. *Id*. at 68, ¶ 23, citing *Rich*, *supra*.

IV. Less Serious vs. Lesser-Included Offenses.

Rules 13.2(c) and 23.3 relate to charging documents and jury verdict forms and address offenses that are "necessarily included" in the offense charged. Those two rules are not implicated where an offense is not a lesser or necessarily included offense for the greater charge, but merely a less serious offense. *State v. Lua*, 237 Ariz. 301, 305, ¶ 16 (2015)(provocation manslaughter is not a lesser-included offense of second-degree murder, but a less serious offense). However, the trial court may instruct the jury regarding attempted provocation manslaughter as a lesser-included offense of attempted second-degree murder so long as the evidence warrants such an instruction; such an instruction affords the jury a less drastic alternative than the choice between

convicting and acquitting on a second-degree murder charge. *Lua*, ¶¶ 7-14. Finally, since provocation manslaughter is not a lesser-included offense of second-degree murder, the trial court need not provide the "reasonable efforts" instruction under *State v. Leblanc*, 186 Ariz. 437, 438 (1996). Instead, jury should be instructed:

> If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant guilty of manslaughter rather than second-degree murder.

State v. Lua, 237 Ariz. 301, 306-07, ¶¶ 19-20, citing RAJI (Standard Criminal) 11.04 (3d ed.).

V. Double Jeopardy vs. Jury Instructions

A defendant's right not to be subjected to double jeopardy is violated if he is convicted of both a greater and lesser-included offense. An offense is lesser-included if it contains all but one of the elements of the greater offense. *State v. Becerra*, 231 Ariz. 200, 205, ¶ 20 (App. 2013); *see also State v. Moran*, 232 Ariz. 528, 536, ¶ 20 (App. 2013)(as part of the constitutional protection against double jeopardy, a defendant convicted of an offense cannot be punished for a lesser-included offense of that crime). In cases where the lesser offense is tried first, a finding of guilt on the lesser-included offense "implies an acquittal on the greater offense" and bars any retrial

The statutorily prescribed elements of the crime determine whether a crime is a lesser-included offense, not the facts of the given case. *State v. Mounce*, 150 Ariz. 3, 5 (App. 1986)(reckless driving not lesser included offense of felony flight because criminal defendant attempting to flee police may not necessarily recklessly endanger persons or

property). However, there is a difference between the same-offense test used for a double jeopardy analysis and the necessarily-included-offense test used in determining whether the jury should be instructed on a lesser-included offense. They are entirely different concepts:

> "Lesser included offense" in regard to jury alternatives is different from what that term means in regard to double jeopardy. The former implements the non-constitutional right of an accused to an instruction which gives the jury an opportunity to convict of an offense with less severe punishment than the crime charged. The latter, on the other hand, involves distinguishing offenses in order to protect against multiple prosecutions for the same crime.

Lemke v. Reyes, 213 Ariz. 232, 238, ¶ 17 (App. 2006), *quoting State v. Baker,* 456 So.2d 419, 422 (Fla.1984).

Thus, in analyzing a double jeopardy claim, the court should not conflate the constitutional protection against multiple prosecutions with the non-constitutional right to a jury instruction for a lesser-included offense. *Id. See, e.g.*, *State v. Hines*, 232 Ariz. 607, 610, ¶ 10 (App. 2013)("There are two tests to determine whether an offense is a lesser included offense: the "elements" test, and the "charging documents" test. . . . Under the charging documents test, a lesser-included offense is an offense that would not always form part of the greater offense but is nonetheless described by the charging document."); *State v. Larson*, 222 Ariz. 341, 343, ¶ 7 (App. 2009)("Generally, there are two tests, the "elements" test and the "charging documents" test, to determine whether one offense is a lesser-included offense of a greater offense.").

For purposes of double jeopardy claims, the standard is that announced in *Blockburger v. United States*, 284 U.S. 299 (1932) and reaffirmed in *United States v. Dixon,* 509 U.S. 688 (1993). In *State v. Ortega,* 220 Ariz. 320, 324–25, ¶ 13 (App.

2008), the Court of Appeals stated the “same elements” test reaffirmed in *Dixon* is the only permissible interpretation of the double jeopardy clause, and questioned the use of charging documents as a separate test for assessing whether two offense are the same for double jeopardy purposes. *See also State v. Price*, 218 Ariz. 311, 313, n. 1 ¶ 5 (App. 2008)(noting, “we question whether [analyzing the charging document] would be appropriate,” citing *Dixon*); *State v. Siddle*, 202 Ariz. 512, 516, ¶ 10 (2002)("In applying this test we focus on the elements of each provision and do not 'consider the particular facts of the case.'"). However, in *Ortega*, the Court noted the same elements test merely prohibits consideration of the underlying facts or conduct, and does not preclude consideration of the offense “as it has been charged” in determining the elements of an offense and whether two offenses are the same*. Ortega*, 220 Ariz. at 325, ¶ 14.

VI. Charging Both Lesser-Included And Greater Offenses: Multiplicity

Rule 13.2 is permissive, not restrictive; thus, the State may charge both the lesser-included and greater offense. *Merlina v. Jejna*, 208 Ariz. 1, 3, ¶¶ 9-10 (App. 2004). Charges are multiplicitous if they charge a single offense in multiple counts, thus potentially subjecting a defendant to double punishment. Multiplicity is determined by applying the test in *Blockburger v. United States*, 284 U.S. 299 (1932); offenses are not the same, and thus not multiplicitous, if each requires proof of a fact that the other does not. But multiplicitous charges do not subject a defendant to double punishment so long as multiple punishments are not imposed. *Merlina*, 208 Ariz. at 4, ¶¶ 12-14, citing *Ohio v. Johnson*, 467 U.S. 493, 500 (1984) (“[T]he State is not prohibited by the Double Jeopardy Clause from charging respondent with greater and lesser included offenses and prosecuting those offenses in a single trial.”). In any event, regardless of whether

lesser-included offenses are formally charged, lesser-included and greater offenses may both be submitted to the jury under Rule 13.2. *Merlina*, 208 Ariz. at 4, ¶ 15.

Further, Arizona courts have only recognized prejudice in submitting separate charges containing identical elements where identical facts are used to support each charge, and the only difference is in the name or number of the statute under which the charge is made. But this problem is not present when the charges involve different proof; then, the State is not required to elect which charge to submit to the jury. Moreover, any possible prejudice can be prevented by a curative instruction which clarifies that a defendant is not charged with multiple separate offenses, such as the same crime committed on separate occasions. *Merlina v. Jejna*, 208 Ariz. 1, 4-5, ¶¶ 16-18 (App. 2004)(holding although extreme DUI (.15 BAC) cannot be committed without also committing the lesser DUI offense (.08 BAC), the totality of proof is not the same; thus, both charges may be submitted to the jury to decide whether the facts support the lesser charge only, or also the greater charge).

VII. Review

Whether an offense is included within another is a question of statutory interpretation that is reviewed de novo. *State v. Lua*, 237 Ariz. 301, 303, ¶ 5 (2015). Thus, a record missing a proposed jury instruction may still be sufficient for full appellate review of whether the trial court erred in concluding that an offense under a particular statute was not a lesser-included offense under another statute. *State v. Geeslin*, 223 Ariz. 553, 555, ¶¶ 9-10 1131 (2010).

VIII. Grand Jury Instructions

The State does not have to instruct a grand jury of lesser-included offenses; the State need only instruct the grand jury on the highest charge supported by the evidence. *State v. Coconino County Superior Court [Mauro, Real Party in Interest]*, 139 Ariz. 422, 425 (1984).